Supreme Court, U.S.
FILED
JUN 24 2002
Jun 24 2002
CLERK

(4)

No. 01-417

In the Supreme Court of the United States

ROBERT J. DEVLIN, Petitioner,

v.

ROBERT A. SCARDELLETTI, *et al.*, Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF PETITIONER

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January 24, 2002

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QUESTION PRESENTED

Whether a class member who, pursuant to Federal Rule of Civil Procedure 23, receives notice of a proposed class action settlement from a federal district court and objects to the settlement in that court must intervene pursuant to Federal Rule of Civil Procedure 24 solely in order to appeal an adverse decision on the merits of his or her objection.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Council of Institutional Investors (the "Council") is an organization of public, Taft-Hartley, and corporate pension funds with over 120 members whose combined assets exceed $1.5 trillion. The Council is recognized as a significant voice for investors on issues of corporate governance, executive compensation, and corporate accountability to shareholders. *See, e.g., In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1198 (N.D. Cal. 1998). The Council has been a leading proponent of meaningful shareholder participation in major decisions that affect corporate viability.

In the 1995 Private Securities Litigation Reform Act ("PSLRA"), Congress recognized that the Council's institutional shareholder members, with their large holdings in many of the country's leading companies, are especially well-positioned to represent the interests of absent class members in many class action disputes, and to prevent the collusion that frequently occurs between defendants and plaintiffs' attorneys in settling such cases. *See, e.g.*, H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (explaining that "[t]he Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions"; decrying the fact that the "current system often works to prevent institutional shareholders" from participating in class actions; and stating that "the Conference Committee seeks to increase the likelihood that institutional investors will" participate by, *inter alia*, providing sufficiently long notice periods to enable institutional

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[1]Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party had any role in authoring this brief, and no persons or entities other than *amicus* made any monetary contribution to its preparation or submission. Pursuant to Rule 37.3, written consent letters from the parties to the filing of this brief are on file with the Clerk of the Court.

shareholders time to convene their boards and decide whether to participate).

The interests of the Council and its members are directly implicated by this case. Two of the Council's members, the California Public Employees' Retirement System ("CalPERS") and the Florida State Board of Administration, fought to preserve objector appellate rights in *CalPERS v. Felzen*, 525 U.S. 315 (1999), and the Council participated as an *amicus curiae*. An affirmance in this case would erect a substantial and unnecessary barrier to participation by objecting institutional shareholders in the review of proposed settlements in class action disputes where their participation is most needed.

SUMMARY OF ARGUMENT

I. The Federal Rules of Civil Procedure ("FRCP") permit objecting class members to appear and object to proposed class-wide settlements in district court proceedings without intervening as parties. Nothing in the Constitution, federal statutes governing appellate jurisdiction, or the Federal Rules of Appellate Procedure ("FRAP") require settlement objectors to intervene simply to take an appeal.

Nor is there any other legal basis for imposing such a requirement. Prior decisions by this Court recognize that all class members *are* parties in interest to a FRCP 23 proceeding. Even (erroneously) presuming that objecting class members are not parties, non-party appeals are common in the federal system and this Court has established a test for determining whether non-parties qualify for appeal, turning on whether: (i) they received notice and an opportunity to be heard in district court proceedings; (ii) they are aggrieved by the district court's rulings; and (iii) they are forbidden by operation of claim or issue preclusion from relitigating their individual claims. Objecting class members meet all of these tests.

II. The Fourth Circuit grounded its decision not on legal principles, but on the *policy* judgment that the federal courts would be overworked without an intervention requirement. Even if such judicial law-making were appropriate, the Fourth Circuit acted without "*any evidence*" suggesting that objector appeals have presented manageability problems in the circuits where they are permitted. Pet. App. A32 (Michael, J., dissenting).

The Fourth Circuit's policy analysis also ignores the fact that an objector appeal provides one of the few checks in a settlement process that otherwise tends toward collusion between class counsel and corporate defendants. When courts of appeals do entertain objector appeals, the result is frequently the rejection or revision of settlements that offer insufficient value for class members; this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), is but one recent example among many.

III. Rule 23.1 derivative suit objectors are as much parties in interest as Rule 23 class members. They also fulfill all of the preconditions for non-party appeals. They receive written notice of any settlement, they have an opportunity to be heard in district court, and they are foreclosed by an adverse decision from pursuing their individual derivative claims. Indeed, the plain language of FRCP 23.1, as well as this Court's decisions, confirm that derivative actions implicate concrete, individual claims belonging to shareholders. Any holding confirming the appellate rights of Rule 23 objectors should be extended to Rule 23.1 objectors; at a minimum, the Court should take care not to foreclose the possibility of appeal by this class of persons.

IV. If this Court is not inclined to permit non-party objector appeals, it should at least ensure that limited intervention for purposes of appeal is a practical possibility under Rule 24(a). Confronted with a substantively inadequate settlement challenged only by a non-party objector, but limited by its own recently-invented rule that only-parties-may appeal, the Seventh Circuit last year rewrote much existing Rule 24 intervention law in that

Circuit to allow an objecting class member to intervene for the sole purpose of appealing. That court's approach seeks to permit objector appeals while recognizing the litigation interests of parties.

ARGUMENT

I. INTERVENTION IS NOT REQUIRED FOR A RULE 23 SETTLEMENT OBJECTOR TO APPEAL

A. The Federal Rules and This Court's Precedents Authorize Appeals by Rule 23 Settlement Objectors

1. All class members are entitled – *without* formally intervening under FRCP 24 – to notice and an opportunity to be heard in the district court before any class-wide settlement is entered. Rule 23 expressly prescribes that a class action "*shall not be . . . compromised* without . . . notice of the proposed compromise . . . to all members of the class." FRCP 23(e) (emphasis added). *See also Advisory Committee Notes to 1966 Amendments* ("[s]ubdivision (e) requires approval of the court, *after* notice, for the . . . compromise of any class action") (emphasis added). It is long-settled practice, unchallenged in this or any of the cases involved in the current circuit split, that class members, once notified, are entitled to present objections to the terms of the proposed settlement before the district court. Indeed, because a settlement is a final and binding judicial resolution of class members' individual claims (particularly in Rule 23(b)(1), 23(b)(2), and 23.1 cases where class members may not "opt-out"),

failure to allow them to be heard in district court proceedings would offend due process.[2]

There is no question that Rule 23 class members have Article III standing to appeal. *In re Navigant Consulting, Inc. Sec. Litig.*, No. 01-2311, 2001 U.S. App. LEXIS 27164, at *7 (7th Cir. Dec. 26, 2001) (Easterbrook, J.) ("Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?"). Nor is there any question that appeals by Rule 23 objectors comport with pertinent statutory authority: 28 U.S.C. § 1291 authorizes appeals from any "final decision" without limiting *who* may appeal. And nothing in the Federal Rules of Appellate Procedure precludes objectors from appealing. *See* Point I.B, *infra*. There is, thus, no legal bar to objector appeals.

2. The only question presented by this case is whether, untethered to any constitutional, statutory, or rule-based authority, the Court should require class members to intervene for the limited purpose of obtaining appellate review of a district court decision overruling their objections to a settlement. Some courts of appeals argue in favor of such judicial activism on the ground that "[o]bservance of form has benefits." *Navigant*, 2001 U.S. App. LEXIS 27164, at *8. While perhaps attractive at first blush, this argument rests on the undefended, even unarticulated, premise that absent class members are not already "parties" to Rule 23 proceedings. That premise is false.

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[2] *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (unnamed class member has a due process right "to be heard and participate in [class action] litigation"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) (unnamed class member has a due process right to object at the fairness hearing); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) (objector entitled to be heard, to examine witnesses and to submit evidence), *cert. denied*, 493 U.S. 1058 (1990); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) (same), *cert. denied*, 424 U.S. 967 (1976).

When Congress uses common law terms in statutes or rules, it is presumed, absent an express contrary indication, to incorporate common law meanings and definitions. *United States v. Carter*, 530 U.S. 255, 264-66 (2000). By the time the Federal Rules of Civil Procedure were adopted, the terms "class" and "class member" had well-established meanings at common law which included the understanding that members of a class action *are* parties in interest to the suit. As early as 1850, this Court held that

> [w]here the *parties interested in the suit* are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a *portion of the parties in interest* to represent the entire body, and the decree binds all of them the same as if all were before the court."

Smith v. Swormstedt, 57 U.S (16 How.) 288, 301 (1850) (emphases added). Indeed, precisely because absent class members were defined by *Swormstedt* to be parties in interest, this Court found no due process impediment in holding that they may be bound by a class action judgment. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921). *Cf. Hansberry v. Lee*, 311 U.S. 32, 42-45 (1940) (class members are "absent parties").

Years before *Swormstedt*, Justice Story, who "is credited with having formulated" the class action in this country, 7A Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 1751, at 10 (2d ed. 1986), explained that, at common law, all class members are entitled to "come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." Joseph Story, *Commentaries on Equity Pleadings* 96 (1840 ed.). *See also West v. Randall*, 29 Fed. Cas. 718, 722-23 (C.C.D.R.I. 1820) (No. 17,424) (Story, J.) (class members may appear in court "as quasi parties to the record").

In this respect, the Court in *Swormstedt*, *Ben-Hur*, and *Hansberry*, as well as Justice Story in his writings, followed longstanding English class action practice in which it was understood that "every individual ought . . . to . . . have the power of appealing, whether he has been a suitor . . . or by some other person as his representative." Frederic Calvert, *Observations on Suits in Equity* 38 (2d ed. 1846) (citing *Osborne v. Usher*, 6 Brown's Parliamentary Cases 20 (1721)).

The fact that the Federal Rules of Civil Procedure lack any definition of the term "party," let alone one suggesting that Congress intended to displace common law understandings of the term, only serves to confirm that class members continue to be parties in interest, as they were at common law. *See Carter*, 530 U.S. at 264-66. To the extent that the Rules do cast light on the meaning of the term "party," moreover, they aid petitioner's cause. Rule 23 provides that class actions are brought by named plaintiffs on behalf of themselves individually and as *representatives* for all others similarly situated. And Rule 10 indicates that a complaint "shall include the names of all parties." Typical of class action complaints, respondents' complaint in this case named as parties "Anthony Santoro, Sr. and George Thomas Debar, individually *and as representatives of a class of all persons similarly situated*," whereas it named other defendants only in their individual capacities, not as representatives of an entire party-class. (Emphasis added.)

3. Even if class members were not already parties in interest to the proceedings, the notion that only parties may appeal cannot bear scrutiny. This Court has repeatedly approved appeals by non-parties with a concrete interest in the litigation – persons and entities it has variously labeled "de facto" or "quasi-" parties – so long as certain prerequisites are satisfied. Objecting class members meet each and every prerequisite established by this Court.

In *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), the Court asked the question, "Is the appellant so far a

party to the original suit that he can appeal?" *Id.* at 655. In that case, Blossom had made a bid for a property at a foreclosure auction. The sale was suspended and Blossom sought to have the sale completed and confirmed. When the district court refused, Blossom appealed. The railroad moved to dismiss the appeal on the ground that Blossom was not a party to the suit in the district court. This Court rejected the railroad's argument and upheld Blossom's appeal, explaining that it

> seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders . . . . Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment became *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgment may be rendered on their [claims]. *Id.* at 655-56.

The Court has endorsed appeals by de facto or quasi- parties in case after case since *Blossom*.[3] The courts of appeals –

[3]*E.g.*, *Williams v. Morgan*, 111 U.S. 684, 700 (1884) (holding that objectors to trustee charges were "quasi parties" entitled to appeal without formally intervening: objectors "had such an interest, and were so situated in the case, that they had a right, by leave of court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court"); *Minnesota Co. v. St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1864) ("nominal parties" could not evade appellate review of an order decreed in their favor on the ground that they were not formal parties in the district court); *Hinckley v. Gilman, Clinton & Springfield R.R.*, 94 U.S. 467, 469 (1877) (receiver allowed to appeal from a decree against him even though he was not a party); *Sage v. Railroad Co.*, 96 U.S. 712, 714 (1877) (quasi parties permitted to appeal); *Trustees v. Greenough*, 105 U.S. 527, 531 (1881) (trustees allowed to appeal order awarding costs and expenses to a complainant suing on behalf of a trust fund); *Hovey v. McDonald*, 109 U.S. (14 Otto) 150, 155-57 (1883) (permitting appeal to be brought against a receiver from an order made in his favor notwithstanding receiver's contention that appellant was not a "party" to the underlying suit); *Ex parte Cockcroft*, 104 U.S. 578, 579 (1882) (actual parties or ones "treated as such" by trial court may appeal); *Bayard v. Lombard*, 50 U.S. (9 How.) 530, 551 (1850) (parties and privies may appeal).

including many of the circuits purporting to require a different rule for objecting class members – likewise regularly entertain appeals from a diverse array of quasi-parties aggrieved by a district court ruling. These include appeals by non-parties held in contempt for refusing discovery seeking to pursue claims of privilege, lack of personal jurisdiction, and other defenses[4]; non-party attorneys and expert witnesses complaining that their fees were denied by the district court[5]; and non-parties obligated to reimburse the defendant for amounts paid under a district court's judgment.[6]

[4]*E.g.*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *General Ins. Co. of Am. v. Eastern Consol. Utils., Inc.*, 126 F.3d 215, 218 (3rd Cir. 1997); *United States v. Bertoli*, 994 F.2d 1002, 1012 (3rd Cir. 1993), *cert. denied*, 510 U.S. 820 (1993); *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 n.2 (5th Cir. 1988); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992); 15A C. Wright, *et al.*, *Federal Practice and Procedure* § 3902.1, at 124 (compiling cases).

[5]*E.g.*, *Angoff v. Goldfine*, 270 F.2d 185, 186 (1st Cir. 1959); *Lipscomb v. Wise*, 643 F.2d 319, 320-21 (5th Cir. 1981); *Price v. Pelka*, 690 F.2d 98, 102 (6th Cir. 1982); *Preston v. United States*, 284 F.2d 514, 515 n.1 (9th Cir. 1960); *United States v. Tippett*, 975 F.2d 713, 718 (10th Cir. 1992); *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 424 (10th Cir. 1979); *James v. Home Constr. Co. of Mobile, Inc.*, 689 F.2d 1357, 1359 (11th Cir. 1982); *See* 15A C. Wright, *et al.*, *Federal Practice and Procedure* § 3902.1, at 126 & n.45 (compiling cases).

[6]*E.g.*, *Fields v. Blum*, 629 F.2d 825, 827 (2d Cir. 1980) (order enjoining reduction of welfare benefits by city official could be appealed by state, since

Distilled to their essence, the foregoing cases permitting non-party appeals all involve individuals or entities who: (i) had notice of the district court proceedings, (ii) actually appeared and litigated their positions in district court, and (iii) were aggrieved by the district court's decision and barred by the doctrine of claim preclusion from re-litigating their claims elsewhere. As Judge Learned Hand explained: While persons who are not formally parties are usually forbidden from appealing because their claims are "not concluded by the decree, and [they are] not therefore aggrieved by it," where a judgment *does* "affect[] [that person's] interests, *he is often allowed to appeal.*" *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934) (emphasis added).

Objecting class members indisputably meet all these conditions. They are entitled to notice and an opportunity to be heard, their personal interests are aggrieved, and any claims they might have are extinguished by operation of an adverse judgment. As recently as 1997, this Court reviewed a case that had been appealed to the court of appeals by a Rule 23 objector without pausing for a moment over the objector's purported lack of "party" status. *Amchem*, 521 U.S. 591.

4. It is axiomatic that courts seek to read rules and statutes in ways that harmonize them and avoid incongruous results. Permitting Rule 23 objectors to appeal comports entirely with Article III and does no damage to the relevant statutory framework governing appeals from final judgments in class actions. Meanwhile, a view of Rule 23 requiring objecting class members to intervene would create serious discordance between Rules 23 and 24.

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state was legally required to reimburse city for payments and controlled both the activities complained of and the conduct of local officials); 15A C. Wright, *et al.*, *Federal Practice and Procedure* § 3902.1, at 127 & n.47 (compiling cases).

First, the proper means for objecting class members to intervene would be under Rule 24(a), as an intervention of right, because the objecting class member's interest "relat[es] to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." FRCP 24(a). But under Rule 24(a), an objecting class member cannot intervene if his or her interest is already "adequately represented by existing parties." *Id.* In any class action or derivative suit, the district court makes just such a finding at the outset of the case, holding that the named plaintiff *does* "fairly and adequately protect the interests of the class." FRCP 23(a)(4).

So, for an objecting class member simply to lodge an objection to the terms of a particular settlement, he or she would have to convince the district court to reconsider its prior ruling and throw out the existing class representative. Much settled law disfavors judicial reconsideration of prior rulings, especially in this context. Once a class representative has been approved, "representation will be presumed adequate." 7C C. Wright, *et al.*, *Federal Practice and Procedure* § 1909, at 324; *cf. Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 691-92 (1961). Indeed, some lower courts have suggested that, as a matter of law, objectors' interests are "adequately protected" by already-approved representatives. *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.), *cert denied*, 469 U.S. 858 (1984). *See also National Ctr. for Mfg. v. Department of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000) (motion for reconsideration will be granted only if new facts "compel" a change in the court's ruling). Interpreting Rule 23 as requiring intervention to appeal, thus, creates a practically unworkable regime: an objector must intervene to appeal, but he or she faces a substantial hurdle in showing that the district court's prior determination that existing representatives are "adequate" should no longer govern.

Though Rule 24(b) would not be the appropriate vehicle for intervention given class members' direct personal stake in the outcome of the case, even if that Rule were applicable it would not solve the problem. Rule 24(b) requires motions to intervene to be "timely." Under existing case law (endorsed by the Fourth Circuit), any motion to intervene made after a tentative settlement has been reached presumptively fails that test. *See* Pet. App. A10-11 (citing cases). Yet, under Rules 23 and 23.1, class members often first become aware of the need to assert their interests only *after* a settlement has been struck. *See* Pet. App. A33-34 (Michael, J., dissenting) ("most unnamed class members do not realize that they might have an objection until they receive notice of the fairness hearing at the end of the litigation"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 20 (1991) (class members receive little information about their case as it goes along).[7]

Second, even if objectors could (somehow) successfully intervene under Rule 24(a) or (b), imposing such a requirement would be inconsistent with Rule 23's structure. Rule 23 provides class members with notice and a right to appear without taking on the encumberances of party status. It would be at odds with the design of the Federal Rules to absolve class members from

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[7]While petitioner in this case had detailed knowledge of the lawsuit prior to settlement, this is unusual. Most individual class members, including many sophisticated institutional investors who are members of the Council, frequently do not have any inkling that their interests are being inadequately represented until *after* a settlement has been reached, as illustrated by the facts of the *Felzen* dispute before this Court three years ago. There, the first written notice of the case was issued to shareholders on May 30, 1997, *after* a settlement had been reached, and it provided objectors with just *four weeks* to prepare for a fairness hearing on a proposed settlement. *See Felzen* Petitioners' Br. 6.

intervening for purposes of raising objections in district court but then require them to intervene *not* for any purpose associated with the district court proceedings (which the Federal Rules of Civil Procedure are designed to govern), but simply to afford "standing" in a *court of appeals*. *See Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999) ("[i]t would make little sense to invite a [class member] to file objections in the manner provided by Rule 23[] and then deny him the right to challenge the district court's ruling on his objection" unless he becomes a party).

B. There Are No Constitutional, Statutory, or Case Law Impediments to Rule 23 Objector Appeals

It is telling that the Fourth Circuit's decision in *Devlin* neither confronts nor cites any of the foregoing legal authorities. Instead, the Fourth Circuit rests its judgment entirely upon its *policy* assessment that "the need for effective class management and to avoid class fragmentation weighs strongly in favor" of requiring objectors to intervene. Pet. App. A21.

Other courts of appeals, most notably the Seventh Circuit, have decried reliance on policy arguments, offering up various legal theories in support of their view that objecting class members must intervene to appeal. *Navigant*, 2001 U.S. App. LEXIS 27164, at *8. But none of these legal theories has borne scrutiny over time and it is no surprise that the Fourth Circuit abandons them even as it struggles to substitute new policy rationales to salvage its favored result.

1. Some early circuit decisions made much of *Marino v. Ortiz*, 484 U.S. 301 (1988). But a growing number of courts, including the Fourth Circuit, have recognized that such reliance is misplaced. Pet App. A15-16 n.12. Unlike Rule 23 objectors, the persons seeking to appeal in *Marino* were not members of the class, but outsiders to the proceedings with no right to participate in the district court under Rule 23. More specifically, they were

white police officers seeking to challenge a class action settlement between black officers and police authorities. Nothing in *Marino* addressed the appellate rights of persons who *are* members of the class whose interests are directly adjudicated by a judgment entered in the case and who receive a mandatory notice expressly inviting them to participate in trial court proceedings. *See Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1308 n.6 (3rd Cir. 1993); *Kaplan*, 192 F.3d at 67-68.[8]

The lone case cited in the pertinent passage of *Marino* confirms the limited nature of *Marino*'s holding – and its inapplicability here. *United States ex rel. Louisiana v. Jack*, 244 U.S. 397 (1917), involved a land dispute between a state agency and a landowner. The State of Louisiana sought to participate in the proceedings. The Court held that the State was not a proper party and explained that "it has long been the law" that only "part[ies] *and priv[ies] to the record*" may appeal an adverse decision, though even to this rule the Court acknowledged some "exceptions." *Id.* at 402 (emphasis added). Objecting class members are at least quasi-parties permitted to appeal under the rule stated in *Louisiana* and approved in *Marino*. *See* pp.7-10, *supra*. Moreover, reading *Marino* as holding that only parties to a lawsuit, or those that properly become parties, may appeal, would require upsetting an enormous body of settled law on the strength of a single phrase in that *per curiam* opinion. *See* notes 3-6, *supra*. That action would be so extraordinary that even respondents do not urge it here.

2. Beyond *Marino*, some circuit decisions (again, notably not the Fourth Circuit's recent ruling) have sought to justify their result by pointing to FRAP 3(c). *E.g.*, *Felzen v. Andreas*, 134 F.3d 873, 874 (7th Cir. 1998). Rule 3(c) provides that "[a] notice

[8]Even as to the strangers to the case at issue in *Marino*, the Court merely purported to establish "better practice," not to establish an exceptionless rule. *See* 484 U.S. at 304.

of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." (Emphasis added.) Since no "party" is taking the appeal from the district court, the reasoning goes, it must be improper under Rule 3(c). This argument founders on its undefended premise that class members are not "parties." *See* pp. 5-7, *supra*. Such a reading of Rule 3(c) would also have the unlikely effect of barring not just Rule 23 objector appeals, but *all* nonparty appeals.

The Federal Rules of Appellate Procedure, moreover, are *not* intended to limit the jurisdiction of the courts of appeals over appeals from final district court judgments; that is the function of Article III and 28 U.S.C. § 1291, neither of which poses any obstacle here. FRAP 1(b) states in no uncertain terms that "[t]hese rules *do not extend or limit the jurisdiction of the courts of appeals*." (Emphasis added.) And the language of Rule 3(c) itself does not purport to delineate who is eligible to appeal. Rather, as its title suggests, Rule 3(c) is concerned only with the formal "*contents* of the notice of appeal" filed by otherwise eligible appellants. (Emphasis added.) Rule 3(c) simply ensures that sufficient information appears on the face of the notice for the court of appeals to discern the issues and litigants before it.[9]

3. On occasion, this Court has stated that only a "party" may appeal. In making such statements, however, no decision of this Court has purported to overrule *Blossom* or its abundant progeny. Indeed, in all of these cases, the litigant seeking to appeal lacked

[9]The 1967 advisory committee notes indicate that Rule 3(c) "merely restate[s], in modified form, provisions now found in the civil and criminal rules . . . and decisions under the present rules which *dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules*." FRAP 3(c) 1967 advisory committee note (emphasis added). *See also* 1979 advisory committee note ("so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with").

at least one of three characteristics that the Court has imposed (in *Blossom* and its progeny) as a precondition for appeal by a non-party litigant. In six of the cases, the purported appellant lacked notice and the opportunity to be heard in the district court.[10] In two of the cases, the would-be appellant did not even participate in district court proceedings.[11] In other cases, the district court's decision did not bind the appellant by force of claim preclusion.[12] Properly understood, this Court's decisions have never denied a right to appeal by a litigant in the same position as a settlement objector.

[10] *Karcher v. May*, 484 U.S. 72, 77 (1987); *Payne v. Niles*, 61 U.S. (20 How.) 219, 221 (1858); *Ex parte Leaf Tobacco Bd.*, 222 U.S. 578, 581 (1911) (specifically acknowledging that "privies to the record" may appeal); *Ex parte Cockcroft*, 104 U.S. at 578-79.

[11] *Ex parte Cutting*, 94 U.S. 14 (1876); *Connor v. Peugh's Lessee*, 59 U.S. (18 How.) 394, 395 (1856).

[12] *E.g.*, *Ex parte Cockcroft*, 104 U.S. at 578 (denying appeal by party who "did not make it appear that he had any real interest in the controversy"); *Payne*, 61 U.S. (20 How.) at 220 (person who had never sought relief directly against judgment debtor could not appeal judgment); *Connor*, 59 U.S. (18 How.) at 395 (tenant who did not contest ejectment prior to judgment could not appeal); *Marino*, 484 U.S. 301 (outsiders to a class action, not class members, seeking to appeal). In fact, some state that non-parties bound by the trial court decision *can* appeal. *E.g.*, *Bayard* 50 U.S. (9 How.) at 551 (noting that "*privies to the record*" as well as parties may appeal). *See also Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42 (1st Cir. 2000) (individuals in a non-class action suit who only might be affected by injunction entered in a software licensing dispute had only "an indirect and incidental" interest in the outcome) (internal quotation marks omitted).

II. THE FOURTH CIRCUIT'S POLICY-BASED RATIONALE FOR REQUIRING INTERVENTION IS LEGALLY INSUFFICIENT AND CANNOT WITHSTAND SCRUTINY ON ITS OWN TERMS

The Fourth Circuit did not pretend to rest its decision on any statutory mandate, rule, or controlling case law. It even disparaged prior attempts by its sister circuits to base an intervention requirement on this Court's decision in *Marino*. Pet. App. A15-16 n.12. The Fourth Circuit instead "balanc[ed]" a series of policy considerations, acting in effect as a mini-legislature. Even assuming the legal sufficiency of such an exercise, the Fourth Circuit's policy rationales are unpersuasive on their own terms.

A. Participation by objectors helps expose and prevent collusive settlements, which are themselves frequent by-products of class action and derivative suit litigation. In Rule 23 and 23.1 disputes, strong economic incentives tempt plaintiffs' counsel and defendants to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation." *Bell Atlantic*, 2 F.3d at 1310; Pet App. 30-31.[13] Settlement hearings frequently devolve into "jointly orchestrated" "pep rallies" in which no party questions the fairness of the settlement.[14] As a result, courts have long considered objecting

[13] *See also Bell Atlantic*, 2 F.3d at 1309 n.8, 1310 n.10 (citing, *inter alia*, Richard A. Posner, *Economic Analysis of Law* § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial").

[14] Macey & Miller, *supra*, 58 U. Chi. L. Rev. at 46. *See also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 714-20 (1986).

class members to "play an important role by giving courts access to information on the settlement's merits," especially because "judges no longer have the full benefit of the adversarial process." *Bell Atlantic*, 2 F.3d at 1310. *See also* Pet. App. A31; *Cohen v. Young*, 127 F.2d 721, 725 (6th Cir. 1942); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984).

Objectors perform this same function on appeal. The right of appeal provides a strong incentive for district courts to consider objectors' concerns and a direct avenue for correcting district court errors. Pet. App. 32; Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. Legal Stud. 379, 408-26 (1995) ("fear of reversal" "induc[es] trial court judges to make fewer errors"). Of the 44 published objector appeals between 1971 and 2000 that the Council has been able to locate in LEXIS, fully 32% (14) resulted in reversals, a higher percentage than for civil cases generally. *See* Administrative Office of the United States Courts, *2000 Annual Reports*, Table B-5 (courts of appeals' reversal rate in civil cases is approximately 12%). In the Rule 23.1 context, 25% of the appealed settlements identified by the Council (7 of 28) were reversed during the same period.

This Court's decision in *Amchem* illustrates the point. Without the participation of objectors, permitted by the Third Circuit and this Court in that case, a highly flawed settlement that failed to compensate many victims and failed to satisfy Rule 23 as a matter of law would have been thrust upon a class of hundreds of thousands of persons exposed to asbestos. *See* 521 U.S. 591. Objector appeals have yielded similar tangible benefits for class members in other recent cases.[15]

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[15]For example, the court of appeals in *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995), held that non-party shareholders could appeal the $2.6 million fee award and the court ultimately held that award to be excessive. "As a direct result," the district court subsequently ordered $1.4 million returned to the corporation. *Id.* at 1448; Order, Civil Case No. 91-B-2164 (D. Colo. Feb. 14, 1997). *See also Kaplan*, 192 F.3d 62 (reversing award of $1 million in fees because the action provided no substantial benefit to the corporation or its shareholders); *Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171 (3rd Cir. 2001) (reversing award of $582,443.44 in fees because the action provided no substantial benefit to the corporation).

B. Even if objectors could (somehow) surmount the legal hurdles posed by an intervention requirement, *see* pp. 10-13, *supra*, requiring intervention would extinguish the modest incentives that now exist for objectors to fulfill their important public function.

Objectors receive no direct financial compensation for their activities, and no guarantee of lucrative attorney fee awards even if they succeed in convincing a court not to approve a settlement. They participate in class action proceedings only for whatever incremental *pro rata* value might accrue to them as a result of their efforts. *Bell Atlantic*, 2 F.3d at 1309. Meanwhile, objectors shoulder the substantial costs of hiring counsel, analyzing settlement materials, filing written objections, and appearing in court, all within a matter of days or weeks. Even the largest institutional investors only rarely have the incentive – and the means – to participate. *See* Remarks of District Judge Vaughn R. Walker, ABA National Securities Litigation Institute at 7-8 (June 5, 1998) ("[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare. . . . This is no surprise. . . . [I]nstitutional investors have disincentives to becoming [parties]. . . . Lawsuits are costly in time, money and other resources.").

Requiring intervention would force objectors wishing to preserve a right of appeal to incur the added financial burden of drafting a pleading the equivalent of a complaint (mandated by Rule 24), litigating the timeliness of their motion and the adequacy of existing representation, as well as assuming the responsibility of appearing for depositions and responding to

written discovery.[16] In addition, because notice of a pending class action suit often first arrives with news of a proposed settlement, *see* p. 12 & note 7, *supra*, class members would be forced to make a snap decision whether to seek and accept the responsibilities associated with party status. Even though they are the most likely to have enough at stake to make participation economical and Congress has sought to encourage their participation in class action litigation, institutional class members simply cannot make such decisions that quickly, because of the need to consult their boards of directors.[17] This Court should not adopt a rule at odds with the policy direction Congress has given in this area. *See* pp. 1-2, *supra*.

C. The Fourth Circuit suggests that requiring intervention serves the purpose of enhancing judicial efficiency. But the substantial costs associated with objecting and appealing *already* deter meaningful shareholder participation in all but the most obvious cases of abuse.

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[16] *Cf.* Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 Ariz. L. Rev. 559, 562 (1996) ("[f]ormal participation and its attendant litigation cost and risk may . . . be an unnecessarily complex and expensive means for institutional investors to express their views on the merits of class action or derivative litigation"); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Shareholders Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2103-05 (1995) (discussing barriers imposed by intervention).

[17] *See* 15 U.S.C. § 78u-4(a)(3)(A)(i) (seeking to increase the likelihood of institutional shareholder participation in class actions by increasing notice period after filing of securities class action complaints to afford potential lead plaintiffs time to come forward); Weiss & Beckerman, 104 Yale L.J. at 2100 ("[l]ack of timely notice makes it difficult for institutional investors to participate in class actions"); pp. 1-2, *supra* (quoting PSLRA House Conference Report).

The Council has been able to locate in LEXIS just 44 Rule 23 objector appeals during the 29-year period 1971-2000, and just 28 such appeals in the Rule 23.1 context. Despite decades of practice permitting objector appeals in the Second, Third, and Ninth Circuits – circuits where a large proportion of all class actions are initiated – the Council is unable to locate a single court or commentator complaining about the manageability of objector appeals. Indeed, the Fourth Circuit below was not presented "with *any evidence* that objector appeals have gummed up the works in the circuits . . . where they are expressly allowed." Pet. App. 32 (emphasis added).[18]

In fact, mandating intervention would impose *more* work on the federal courts, not less. The district court would have to litigate and resolve a motion to intervene as well as a settlement hearing. Pet. App. A34 (Judge Michael noting "the intervention alternative . . . does nothing to take care of [the] concern about "delay[ing] class settlements on appeal"). *See also Webcor Elecs. v. Whiting*, 101 F.R.D. 461, 463 (D. Del. 1984) (complaining that Rule 24 motion to intervene was "superfluous procedural question" since nonparty objector was already an invited participant in litigation).

D. The Seventh Circuit recently criticized the Fourth Circuit's decision below as an example of "policymaking by judges." *Navigant*, 2001 U.S. App. LEXIS 27164, at *6. Yet, besides discredited arguments from *Marino* and Rule 3(c), the Seventh Circuit itself offered only a policy argument for intervention, opining that requiring litigants to take the formal

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[18] The government, which bears responsibility in assisting in the administration and development of the Federal Rules and the enforcement of the securities laws that give rise to many class actions, just three years ago in *Felzen* endorsed objector appeals and represented that it is not concerned "that [the] limited degree of participation by persons other than the named plaintiff will unduly disrupt the litigation or render it unmanageable." *Felzen* Gov't Br., No. 97-1732, at 28.

step of becoming parties "has benefits, such as a reduction in uncertainty and the costs that uncertainty breeds." *Id.* at *8.

The invocation of "uncertainty," without more, is analytically unhelpful. The Seventh Circuit opined that intervention prior to settlement in *Navigant* might have led to additional discovery that, in turn, might have assisted the district court in deciding whether to accept the proposed settlement; by "remaining on the sidelines until after" the settlement, the objectors "hobbled" inquiry into their views. *Id.* at *9. But this argument rests on the erroneous assumption that objectors are typically aware of a pending class action and dissatisfied with existing class representation before a tentative settlement is reached. That is the rare and exceptional case (*see* p.12 & note 7, *supra*), not the norm, and thus (even assuming its legitimacy) can hardly be used as a reliable basis for judicial policymaking.

Nor is there any basis for believing that discovery will aid in resolving all, most, or even any significant number of, settlement objections. It would not have done so in *Amchem* or in similar cases where the objector contends that the settlement agreement is illegal, a question for which no factual inquiry is necessary.[19] Discovery is likewise unnecessary to resolve objector claims that the district court failed to fulfill its own procedural requirements, a frequent basis for appellate reversal.[20] Often, too, objectors attack the size of an attorney fee award in proportion to the results achieved for the class, a question that courts are well-equipped to handle and frequently do so comfortably without burdensome depositions, interrogatories, and the like. *See* p.18 & note 15, *supra* (citing *Rosenbaum, Kaplan, Zucker*). There is also at least some irony in the fact that the Fourth Circuit would mandate

[19] *E.g.*, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3rd Cir. 1995), *cert. denied*, 516 U.S. 824 (1996).

[20] E.g., *Ficalora v. Lockheed California Co.*, 751 F.2d 995, 997 (9th Cir. 1985); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

intervention out of concern for efficiency and reducing the federal court workload, but the Seventh Circuit would mandate intervention to enable "extra discovery," *Navigant*, 2001 U.S. App. LEXIS 27164, at *8, always a time-consuming and contentious task.

III. RULE 23.1 SETTLEMENT OBJECTORS SHOULD ALSO BE PERMITTED TO APPEAL

Rule 23.1 objectors have at least as strong a case for a right to appeal as Rule 23 objectors, and any ruling permitting Rule 23 objector appeals should be extended to the Rule 23.1 context.[21] As with Rule 23 class members, there is no Article III, § 1291, or rule-based bar to Rule 23.1 objector appeals. Nor should the Court manufacture one.

First, Rule 23.1 shareholders are as much parties in interest as class members. Like their Rule 23 counterparts, objecting derivative suit shareholders are *personally* aggrieved by a district court decision approving an adverse settlement. The Federal Rules recognize this point not only by affording objectors with an opportunity to be heard before any settlement is approved, but also by requiring that the lead plaintiff must "fairly and adequately represent the *interests of the shareholders,*" *not* the corporation. FRCP 23.1 (emphasis added).

In the course of developing the derivative suit paradigm, this Court in *Hawes v. City of Oakland*, 104 U.S. (14 Otto) 450 (1881), explained that such a suit is really "two causes of action": it is a claim on behalf of the company against those who allegedly wronged its interests, but it is *also* a claim by shareholders directly against their "own company" for refusing to take

[21] At a minimum, the Court should avoid reaching out beyond the Question Presented, limited to "class action settlements," to extinguish long-held appellate rights of shareholders without the full benefit of the adversarial process.

corrective action in response to the shareholders' demands. *Id.* at 452. Similarly, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court held that a lead shareholder plaintiff owes "fiduciary" duties *not* to the corporation, but to "a class comprising all who are similarly situated" – *i.e.*, other shareholders; "[t]he interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity." *Id.* at 549.

Any number of lower courts and respected commentators have similarly recognized the personal shareholder interests at stake in derivative litigation,[22] and so have the Department of Justice and the Securities and Exchange Commission, the federal agencies charged with enforcing the nation's securities laws: "[o]wnership of the corporation's stock . . . gives both the objecting shareholder and the plaintiff shareholder a shared interest in the outcome of the case." *Felzen* Gov't Br. 13.[23]

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[22]*See, e.g., In re Pittsburgh & Lake Erie R.R. Sec. & Antitrust Litig.*, 543 F.2d 1058, 1069-70 (3rd Cir. 1976) (shareholders may appeal derivative suit since their "equity is being diluted"; their "distinctive interests are as worthy of consideration and protection as [party] shareholders"); *United States v. LTV Corp.*, 746 F.2d 51, 53-54 n.5 (D.C. Cir. 1984) (objectors may appeal settlement approvals in derivative context because "judgments in such cases bind shareholders"); 5 *Moore's Federal Practice* § 23.1.02[3][b] (D. Coquillette, et al. eds., 3d ed. 1997) ("As an owner of securities in the corporation, the suing shareholder, along with all other shareholders, is harmed by an injury to the corporation.").

[23]Real world experience teaches, too, that shareholders have concrete and direct interests in the outcome of these cases. In the *Felzen* case before this Court three years ago, objectors took issue with a settlement that returned $8 million in value to the corporation and its shareholders instead of the $250 million claimed. The difference amounted to 37 cents per share, or better than 2% per share at current share prices. Petitioner CalPERS alone owned over 2.9 million shares of ADM stock at the time, meaning that its *pro rata* loss can be pegged at over $1 million. Other large institutional investors like CalPERS who control the retirement savings of millions of Americans shared *pro rata* losses in the value of their stock holdings almost as large. The Council and its members are increasingly active in Rule 23 and Rule 23.1 cases precisely because of their large and direct stakes in the outcome of these disputes.

Second, even supposing that shareholders are not parties, they satisfy all the prerequisites required for non-party appeals. *See* pp. 7-10, *supra*. They are provided with written notice of any settlement, and an opportunity to be heard.[24] As *Hawes, Cohen*, and Rule 23.1 confirm, an adverse decision affects their personal interests and an adverse judgment subjects shareholders not just to *stare decisis*, but also to claim preclusion. This Court has already expressly held that shareholders who receive notice and present argument in the district court are "entitled," without intervention, to appeal a receivership ruling that aggrieves them. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 495 & n.4 (1933).[25]

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[24]Until 1966, when Rule 23.1 was broken out into a separate rule, derivative actions were considered a form of class actions governed by what was then Rule 23(b). 7A C. Wright, et al., *Federal Practice and Procedure* § 1752, at 18. As the identity of the language used by Rules 23(e) and 23.1 suggests, that division was in no way intended to grant lesser rights to objecting shareholders than objecting class members. On the contrary, the Advisory Committee specifically noted that the "mandatory notice" requirement contained in old Rule 23 "was *primarily directed* to derivative actions by shareholders." Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure 114 (1964) (citing *Cunningham v. English*, 269 F.2d 539 (D.C. Cir. 1959)) (emphasis added). As in the Rule 23 context, there is an uninterrupted body of law requiring district courts to provide objecting shareholders with an opportunity to be heard at the fairness hearing.

[25]*Johnson* cited for support the Second Circuit's decision in *Christian v. R. Hoe & Co.*, 63 F.2d 218 (2d Cir. 1933), which held that a nonparty shareholder who objected to a receivership "is rightfully here, like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal." *Id.* at 218.

Until the very recent emergence of a circuit conflict on this issue, the appellate rights of Rule 23.1 objectors were once so well-established that then-Judge Stevens categorically stated in 1975 that "[t]he law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action."[26] This view of the law remains correct today, as recognized by the Second Circuit, which recently reaffirmed its longstanding precedent permitting Rule 23.1 objector appeals, and did so without a single dissenting vote in the entire circuit. *Kaplan*, 192 F.3d 60 (rehearing *en banc* denied). Indeed, the case for allowing shareholders to appeal is *stronger* than that for many class members because Rule 23.1 provides no mechanism for objecting shareholders to opt out of an unfavorable settlement. *Rosenbaum*, 64 F.3d at 1442 (considerations permitting appeal apply "more clearly" in Rule 23.1 context).[27]

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[26] *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975), *overruled by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided Court*, 525 U.S. 315 (1999).

[27] All of the remaining arguments that support objector appeals in the Rule 23 context apply equally well here. A rule requiring intervention would render the Federal Rules incoherent because participation is practically impossible under Rule 24's strictures. *See* pp. 10-13, *supra*. Meanwhile, Rule 23.1 objectors help expose collusive settlements; they have produced an impressive rate of appellate reversals, adding real value to shareholders; there have been no manageability problems suggested by the many courts of appeals that allow objecting shareholders to appeal; and requiring intervention would add, not reduce, the workload of the federal courts, by imposing burdensome litigation requirements that do not contribute to resolving the merits of the objectors' concerns about the proposed settlement. *See* pp. 17-23, *supra*.

IV. AT A MINIMUM, THE COURT SHOULD MAKE INTERVENTION A PRACTICAL POSSIBILITY FOR OBJECTORS

Faced with a substantively inadequate settlement approved by the district court that it wished to reverse, but saddled with the flawed only-parties-may-appeal rule it forged in *Felzen*, the Seventh Circuit recently sought to rewrite much intervention law in order to make it possible for an objecting class member to appeal. *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 880-81 (7th Cir. 2000) (Easterbrook, J.). The district court in *Crawford* had rejected the objector's attempts to intervene as untimely, noting that the objector's counsel (like petitioner here) had early knowledge of the case but failed to file a motion to intervene. The district court also refused to grant intervention on the ground that to do so it would have to find the objector's interests inadequately represented and, thus, would have to displace the existing class representative, sending the entire case into disarray. The court of appeals rejected both of these arguments, and held that the district court had abused its discretion in denying intervention because objectors should have the right to intervene at least for the limited purpose of appealing. *Id. See also In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001) (Easterbrook, J.).

In holding that the district had abused its discretion by failing to allow intervention after the settlement agreement was struck, the Seventh Circuit rejected the untimeliness arguments that the Fourth Circuit in this case and other courts have found persuasive grounds for denying intervention. *See* Pet. App. A10-11 (citing cases). The *Crawford* court even (implicitly) contradicted existing Seventh Circuit authority in *Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991), which held that "[o]nce the parties have invested time and effort into settling a case it would be prejudicial to allow intervention." *Id.* at 504.

But what the Seventh Circuit appeared to give settlement objectors in *Crawford*, it seemed to take away late last year in *Navigant*. In *Navigant*, the court rejected the notion that a settlement objector has an absolute right to intervene for purposes of appealing, holding that the objector "probably should have intervened *before the settlement was negotiated*," thus apparently reverting to the Seventh Circuit's original rule in *Ragsdale*. 2001 U.S. App. LEXIS 27164, at *3 (emphasis added).

Though the continuing vitality and scope of the Seventh Circuit's decision in *Crawford* permitting intervention for purposes of appealing an adverse settlement is unclear, it remains possible that the court of appeals is inclined to overrule much existing intervention case law in an effort to make it practically possible for at least some objectors to appeal. If this Court is inclined to hold that only parties may appeal, the Council respectfully suggests that it at least attempt to make intervention a practical possibility in the following manner.

Because intervention would properly be a matter of right, *see* p. 11, *supra*, the correct legal vehicle for any new intervention requirement must be Rule 24(a). Currently, the lower courts are loathe to allow intervention under Rule 24(a) because they are required to find the intervenor's interests inadequately represented, which in turn has the cascading effect of forcing them to reconsider their finding, under Rule 23, that the existing class representative adequately represents the interests of all class members. *See* p. 11, *supra*. The Seventh Circuit's position in *Crawford* suggests a view of Rule 24(a) and Rule 23 under which the district court might hold that the objector's views on the terms of a particular settlement are inadequately represented (so that he or she may intervene), but continue to hold that the existing named class representative fairly and adequately represents the class as a whole (so that the existing class representative need not be displaced).

Limiting an objector's right to intervene solely for the purpose of allowing an appeal would also decrease the chance of disruption to existing proceedings and prevent objectors from having to assume the onerous duties associated with party status simply to appeal. Intervention for limited purposes is consistent with the Notes to the 1966 Amendment of Rule 24(a), which indicate that "an intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."

Even if the foregoing presents a workable solution, however, the question remains, what would be gained by such a watered-down intervention requirement? The answer is: nothing. It would require the Court to slice the language of Rules 23 and 24 very thinly indeed – suggesting that the class representative is "inadequate" for some purposes but not others. It would also burden the federal courts with needless motions practice, all so that objectors can obtain a stamp on their passport allowing them to proceed to an appellate court just as they did for decades before the advent of a "party-only" requirement.

The Court should reject the Fourth Circuit's imposition of a new intervention requirement on settlement objectors. There is no constitutional or statutory basis for such a rule. It runs directly contrary to centuries of common law precedent and is inconsistent with the Federal Rules and this Court's cases. It hinders the valuable public functions objector appeals serve while offering no corresponding policy benefits. It should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 24, 2002

APPENDIX

Federal Rule of Civil Procedure 23:
Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

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(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B)

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Class Actions, cont'd

the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of

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the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 , and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Federal Rule of Civil Procedure 23.1: Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege

(1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and

(2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Federal Rule of Civil Procedure 24: Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to

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intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.